In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Petitioner's Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTS

OTHER AUTHORITIES

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 116 U.S. App. D.C. 198, 322 F.2d 411. The original Decision and Order of the National Labor Relations Board is reported at 130 NLRB 1558 and the Board's Supplemental Decision and Order is reported at 138 NLRB 550.

JURISDICTION

The judgment of the Court below was entered on July 3, 1963 (R. 179). On July 26, 1963, within the time allowed

by order (R. 180), a petition for rehearing was filed (R. 180). On September 27, 1963, the petition for rehearing was denied (R. 181). On October 10, 1963, the decree of enforcement was filed (R. 182). Certiorari was allowed on January 6, 1964 (R. 183-184). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court below and of the National Labor Relations Board rested on 29 U.S.C. § 160.

QUESTIONS PRESENTED

Certiorari was granted upon the following questions:

1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

2. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?

The petition for certiorari also raised questions as to the sufficiency of the evidence and findings to support the Board's conclusion that Petitioner was guilty of a refusal to bargain, and as to the propriety of the Board's conduct in delaying action upon the motions for reconsideration of its original decision for a year and one-half because the four members of the Board who were qualified to participate in the case were equally divided, instead of promptly denying the motions because of the equal division in the Board. However, certiorari was granted only upon the two questions above stated.

STATUTES INVOLVED

Statutes involved in the case are Sections 8(a), 8(d), 9(a) and 10(c) of the National Labor Relations Act (29 U.S. Code §§ 158(a), 158(d), 159(a) and 160(c)), and section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)). Their text is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner has a manufacturing plant at Emeryville, California.

Until August of 1959, Petitioner did its own maintenance work about the plant. Some of its maintenance employees were represented for purposes of collective bargaining by a local of the United Steelworkers of America (hereinafter called the Union), with which Petitioner had a contract (R. 46).[1] The contract terminated on July 31, 1959 (R. 46) by reason of a sixty-day notice given by the Union (R. 47, 61). The notice had been supplemented by a proposal for a new contract involving substantial increases in all cost items (R. 61).

Petitioner had been concerned for some time about the high cost of its maintenance work (R. 57). Efforts to obtain the Union's cooperation in effecting lower costs had been unsuccessful (R. 53-54, 103-104), and Petitioner had studied the possibility of effecting savings by having the work done by a contractor specializing in plant maintenance (R. 57).

Following receipt of the Union's proposal above mentioned, the study was brought up to date (R. 57-58). It

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1. There were five bargaining units of maintenance workers, of which the Steelworkers represented only one. The other four were represented respectively by the Steamfitters Union, the Ironworkers Union, the Carpenters Union, and the Electricians Union (R. 102). In stating that the Steelworkers' contract "covered all Respondent's maintenance employees" (R. 46), the Trial Examiner was in error.

indicated that Petitioner might effect savings amounting to as much as $225,000 per year by letting the work to an independent contractor (R. 58). In early August, after notifying the Union of its intention, outlining a plan of severance pay for employees to be terminated and discussing the matter at some length with the Union's business agents and, later, its negotiating committee (R. 49-54), Petitioner entered into a contract with Fluor Maintenance Company for performance of the maintenance work by Fluor (R. 58). Its sole purpose in doing so was to effect savings in its maintenance costs (R. 60).

Thereafter, Petitioner was charged by the Union with certain unfair labor practices, including a refusal to bargain, and proceedings were had before the National Labor Relations Board.

The Board's Original Decision.

In his Intermediate Report, the Trial Examiner set forth the facts stated above, including an account of the correspondence and discussions between Petitioner and the Union (R. 49-54), and found that "the allegations of the complaint, as amended, that [Petitioner] had engaged in certain acts and conduct violative of Section 8(a)(1), (3) and (5) of the Act are not supported by substantial evidence" (R. 61). He recommended dismissal (ibid.).

The Board, in a decision issued March 29, 1961, adopted "the findings, conclusions and recommendations of the Trial Examiner" (R. 35). The Board specifically agreed with the Trial Examiner that Petitioner's "motive in contracting out its maintenance work was economic rather than discriminatory," that its maintenance employees "were validly terminated," and that it had satisfied its obligation to bargain about termination pay (R. 36).

The Board then noted a contention by General Counsel "that the Trial Examiner did not pass upon an issue of primary importance in this case," namely, whether Petitioner "was under a statutory duty to bargain . . . about its *decision* to contract out the maintenance work" (R. 36), and the Board went on to discuss this question.

It was long-settled Board doctrine (see pp. 14-15, 30-33, *infra*) that although an employer must bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment), designed to ease the impact upon employees of a legitimate business decision to contract out work or to close or move a plant, he need not bargain about the decision itself. In conformity with that doctrine, the Board, with one dissent, held that the statutory language is not "so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort" (R. 38).

It dismissed the complaint (R. 39).

The Board's Supplemental Decision and Order.

Shortly after the decision there were certain changes in the membership of the Board, and both the Union and General Counsel moved for reconsideration. The Board did not act upon the motions until September 14, 1962, nearly a year and a half later, when a three-member Panel, one member dissenting, rendered the Supplemental Decision and Order here under review.

A few months before its Supplemental Decision, the Board had prepared the ground for what was to come by announcing by way of dictum in *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022, decided April

13, 1962, that an employer's action in contracting out work without consulting the union representing affected employees would have constituted a refusal to bargain even if the employer had been motivated solely by economic considerations (136 NLRB at 1026). We refer to this as a dictum because the question was not presented; the employer had contracted out the work "to disparage and undermine the Union as majority bargaining agent" and was guilty of a refusal to bargain for this reason (ibid.).

The reason for the Board's long delay in acting upon the motions for reconsideration in the present case was that one of the Board's new members (Brown) was disqualified from participating in the case because he, as a regional director, had issued the complaint (R. 9), and the other four were equally divided.[2] Instead of denying the motions for reconsideration because of this equal division, the Board, in the words of the Solicitor General, postponed "its decision on the motions of reconsideration until, as a result of another decision [the *Town and Country* case], the majority view could be applied in the present case"[3]—in other words, until the view of the member who was disqualified from participating in the case could be given effect therein.

In the Supplemental Decision and Order, the Panel simultaneously granted the Union's motion for reconsideration (R. 19), and modified the original decision by holding that Petitioner had been under a duty to bargain about whether

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2. Members Rogers and Leedom had joined in the original decision and had dissented in *Town and Country Manufacturing Co.* Member Fanning had dissented from the original decision and had been joined by the new Chairman McCulloch and by new member Brown in the *Town and Country Manufacturing Co.* decision.

3. The quotation is from page 6 of the Solicitor General's response to the petition for certiorari.

to contract out its maintenance work (R. 20). It ordered Petitioner to resume performance of the maintenance operations, to reinstate the individuals formerly employed therein with back pay from the date of the order, and to then bargain about whether it should contract out the work (R. 27). After satisfying its obligation to bargain, it was to be free to again contract out the work (R. 25).

The Panel did not disturb the Board's original holding that Petitioner had not violated Section 8(a)(1) or 8(a)(3) of the Act and had satisfied its obligation to bargain about termination pay. The sole ground of the order was that Petitioner had been under a duty to bargain about whether to contract out the work, a conclusion to which the Panel said that it was driven by the decisions of this Court in *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (R. 21).

Regarding the nature and extent of the bargaining duty thus imposed, the Panel, quoting with approval its dictum in *Town and Country Manufacturing Company, Inc., supra*, said (R. 20-21):

> "Experience has shown . . . that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less."

Arguably, Petitioner had engaged in the prior discussion which "is all that the Act contemplates"; it had advised the Union of its intention to contract out the work (R. 49-50), had explained that its reason for doing so was to effect

savings in maintenance costs (R. 53-54), had repeatedly offered to discuss any questions that the Union might have (R. 50, 53, 108), and had offered to entertain a proposal, which the Union did not see fit to make, that contracting be deferred to permit of further discussion (R. 54, 86). However, if the Panel had these discussions in mind, it apparently did not regard them as conforming to its notion of bargaining.[4]

In justification of the "remedy" upon which it settled, the Panel had this to say (R. 25):

> "As we stated in *Town and Country* 'It would be an exercise in futility to attempt to remedy this type of violation if an employer's decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has already been made and implemented.' To adapt the remedy 'to the situation which calls for redress,' we shall order the Respondent to restore the *status quo ante* by reinstituting its maintenance operation and fulfilling its statutory obligation to bargain. Where that obligation has been satisfied after the resumption of bargaining, Respondent may, of course, lawfully subcontract is maintenance work.
>
> "As we further stated in *Town and Country*, 'it would be equally futile to direct an employer to bargain with the exclusive bargaining representative of his employees over the termination of jobs which they no longer hold. Since the loss of employment stemmed

4. The Panel made no mention of the discussions between Petitioner and the Union. It did not consider or find upon the question whether those discussions satisfied the bargaining requirement which its decision imposed, but assumed that the Board had found in its original decision that Petitioner had let the contract "without first negotiating with the duly designated bargaining agent over its decision to do so" (R. 19). That assumption was erroneous. In its original decision, the Board had confined itself to the question whether there was a duty to bargain about whether to let the contract and, holding that there was not, had never reached or considered the question whether such bargaining had in fact occurred.

> directly from their employer's unlawful action in bypassing their bargaining agent, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action.' Accordingly, we shall order that Respondent offer reinstatement to the employees engaged in the maintenance operation to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. We shall also order that Respondent make them whole for any loss of earnings suffered as a result of Respondent's unlawful action in bypassing their bargaining agent and unilaterally subcontracting their jobs out of existence."

It added in a footnote (R. 25, n. 19) that the order imposed no "undue or unfair burden" on Petitioner, saying that "The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement." How the record could possibly show this in view of the fact that it had been three years since the evidence was closed, the Panel did not explain. And almost in the same breath with the statement above quoted, it denied Petitioner's request that the record be reopened for evidence that the operation was *not* still the same—that Petitioner had permanently discontinued certain of its manufacturing operations and had moved others to a new plant in another city, with substantial effect upon the nature and extent of the maintenance work at Emeryville (R. 19, n. 2).

The Decision of the Court of Appeals.

Petitioner petitioned for review of the decision, and the Board cross-petitioned for enforcement. The Court below granted the Board's request for enforcement. Rehearing was denied.

Upon the question whether Petitioner had been under a duty to bargain about its decision to contract out the work, the Court, referring to the 1947 revision of the Act, correctly stated (R. 176):

> "In framing section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively."

But the Court continued on without observing that those decisions had denied the existence of a duty to bargain about a decision to contract out work (see pp. 14, 30-31, *infra*). Nor did the Court mention any of the subsequent decisions of the Board and the courts, of which there have been a number, dealing with the question (see p. 15, *infra*). The Court apparently was impressed by the fact that Petitioner's unilateral action "extinguished the entire collective bargaining unit" (R. 175).

Regarding the nature and extent of the bargaining duty, the Court was of the opinion that Petitioner, before taking unilateral action, should have bargained to an "impasse" (R. 174, 175).

Petitioner's objections to the requirement that it resume performance of the maintenance operations and reinstate with back pay the individuals who had been employed therein went unnoticed.

SUMMARY OF ARGUMENT

(1) The Act does not by its terms require bargaining about whether an employer shall carry on particular business operations, but requires only that he bargain about the "wages, hours and other terms and conditions" upon which men are to be employed in the operations upon which he decides. While the Act may require bargaining about meas-

ures such as the provision of other work (tenure of employment) and termination pay (wages) tending to ease the impact upon employees of an employer's decision to rearrange his business, it does not require bargaining about the decision itself. This is the construction of the Act to which the Board adhered for twenty-seven years, and which Congress approved by leaving it undisturbed in two general revisions of the Act. The Board's newly conceived requirement of bargaining about every business decision having an impact upon employment or employees does violence to the language of the Act and means that the area in which bargaining is mandatory is without limits. It is impossible to conceive of a business decision (or of a union decision for that matter) which would be without impact upon employees or employment. Under the Board's new doctrine, no business decision can be made or effectuated except after the delays involved in negotiating with one or more unions, and except at the risk that what is done will some months or years later be ordered undone because of failure of the negotiations to conform in some respect to the Board's erratic notions of bargaining.

If the fact that the entire bargaining unit was extinguished has significance, its significance is the opposite of that given it by the Court below. Inasmuch as Petitioner did not want the services of any of those represented by the Union, the Union had nothing about which to bargain. An individual, while having the right to withhold his services and, therefore, to require bargaining about the terms upon which they will be made available to an employer who wants them, is possessed of no right to force them upon an employer who wants no part of them, or to require bargaining for their utilization. In holding that a union is entitled to require bargaining for the utilization of unwanted serv-

ices, the Board has held that a bargaining representative is entitled to exercise on behalf of those whom it represents a right which they do not possess.

(2) In requiring that Petitioner reinstate employees who were terminated for legitimate business reasons, the Board violated section 10(c) of the Act, which denies it power to reinstate employees terminated for cause. "Cause," as the legislative history shows, embraces any legitimate reason; the Board is empowered to reinstate only where the discharge was for what Senator Taft called "union activity."

Furthermore, the order is punitive rather than remedial. Petitioner was guilty only of a refusal to bargain. Since, as the Board has found, Petitioner is interested only in operating profitably and not in discriminating against the Union or its members, an order that it bargain about resuming performance of the work would serve fully the purposes of the Act. The award of back pay is not in aid of bargaining. And the requirement that bargaining be preceded by a resumption of operations and reinstatement is self-defeating, for there can be no assurance that bargaining would result in anything other than a return to contracting, and no terminated employee would consider leaving his current employment to return to Petitioner unless a bargain were first struck assuring him of something more than purely temporary employment at 1959 wage rates. Insofar as the order is based upon the theory that the letting of the contract was the "fruit" of Petitioner's refusal to bargain, it assumes without warrant in the record that bargaining would have resulted in abandonment by Petitioner of its plan to let the contract. Speculation that bargaining would have had one outcome rather than another is not a proper basis for a remedial order. In requiring that Petitioner turn back the clock three years (now five) and resume, without

prospect of reduced costs, performance of an operation which had been abandoned because it was too costly, the order serves no legitimate purpose and imposes upon Petitioner an unreasonable and unmerited hardship.

ARGUMENT

I. The Act does not require bargaining about whether to let work to an independent contractor.

The language of the Act does not, in terms either specific or general, impose a duty to bargain about whether to let work to an independent contractor, and until the recent change in its membership the Board, with court and congressional approval, denied the existence of such a duty. We think it plain, for reasons upon which we are about to elaborate, that the Board's newly conceived doctrine is erroneous.

A. The Act does not by its terms require bargaining about the composition of an employer's business; it requires bargaining only about the wages, hours and other terms and conditions upon which men are to be employed therein.

The question whether Petitioner was under a duty to bargain about whether or not to contract out its maintenance work depends ultimately for its answer upon the meaning of the following provision of section 8(d) of the Act (29 U.S.C. § 158(d)):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ."

Patently, the nature and extent of the business operations in which an employer shall engage is *not* one of the subjects

of mandatory bargaining specified in the foregoing provision. There is a manifest difference between a question as to whether an employer shall carry on particular business operations and a question as to the wages, hours or conditions at or upon which men are to be employed therein. The above provision, by its terms, requires bargaining only about the latter question, not about the former. As the Board said in its original decision in the present case (R. 38):

> ". . . although the statutory language is broad, we do not believe that it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort."

The foregoing was not the Board's first decision to that effect. On the contrary, during the preceding twenty-odd years, it had repeatedly and consistently held that an employer was not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant. *Brown McLaren Manufacturing Company*, 34 NLRB 984 (1941); *Mahoning Mining Company*, 61 NLRB 792, 803 (1945); *Walter Holm & Company*, 87 NLRB 1169, 1172 (1949); *Celanese Corporation of America*, 95 NLRB 664, 713 (1951); *Krantz Wire & Mfg. Co.*, 97 NLRB 971, 988 (1952); *National Gas Company*, 99 NLRB 273 (1952). He was required to bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment) designed to ease the impact of the decision upon his employees (see, e.g., *Walter Holm & Company, supra; National Gas Company, supra; Brown Truck & Trailer Mfg. Co., Inc.*, 106 NLRB 999

(1953); *Bickford Shoes, Inc.*, 109 NLRB 1346 (1954); *California Footwear Co.*, 114 NLRB 765 (1955), enf. in part, 246 F.2d 886 (9th Cir. 1957); *Shamrock Dairy, Inc.*, 124 NLRB 494 (1959), enf. 280 F.2d 665 (D.C. Cir. 1960), cert. den. 364 U.S. 892), but he was not required to bargain about the decision itself.

Prior to the Board's reconsideration of the present case, three Courts of Appeals had given effect to the foregoing distinction and had squarely held that there was no duty to bargain over a decision to contract out work or close or move a plant (*Mount Hope Finishing Company v. NLRB*, 211 F.2d 365 (4th Cir, 1954); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961)) and a fourth has since held to the same effect (*NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963)). See also *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963); *NLRB v. Abbott Publishing Co.*, 331 F.2d 209 (7th Cir. 1964). Cf. *Jewel Tea Co. v. Associated Food Dealers of Greater Chicago, Inc.*, 331 F.2d 547 (7th Cir. 1964).

Also reflecting that long-accepted view of the law were cases such as *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954); *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954); *NLRB v. Adkins Transfer Co., Inc.*, 226 F.2d 324 (6th Cir. 1955); *NLRB v. Drennon Food Products Co.*, 272 F.2d 23 (5th Cir. 1959); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), cert. den. 366 U.S. 909; and *NLRB v. Kingsford*, 313 F.2d 826 (6th Cir. 1963), in which the legality of unilateral action in contracting out work or closing a plant was treated by both the Board and the courts as depending entirely upon the employer's motive:

neither the Board nor anyone else thought of contending that bargaining was required.[5]

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5. Illustrative of the general understanding of what was, and what was not, embraced by the statutory phrase, "wages, hours and other terms and conditions of employment," were remarks made in 1956 to the American Academy of Arbitrators by Mr. Justice Goldberg, then general counsel of the United Steelworkers of America. See Arthur J. Goldberg, "Management's Reserved Rights: A Labor View," 7 Proceedings of the National Academy of Arbitrators 118, B.N.A. 1956. He said:

> "When a contract says that management has the exclusive right to manage the business, it obviously refers to *the countless questions which arise and are not covered by wages, hours, and working conditions, such as determination of products, equipment, materials, prices, etc.*"
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> "Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has the right to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have that improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute.
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> "Our ability to have this accepted without question depends on equally clear acceptance by management of the view that the exercise of these rights cannot diminish the rights of the worker and the union. For instance, a new method of manufacture may raise several issues of working arrangements, crews, spell periods, schedules, rates, etc. These are usually susceptible to determination by application of contract clauses, practices, precedents, etc. An effort to claim that the exclusive right of management to establish a new method of manufacture keeps the worker from objecting effectively to the resulting working conditions not only confuses the labor-management issues, but it makes more difficult unequivocal acceptance of the rights of management. We are entirely in agreement that the company can establish the manufacturing methods, but if management attempts to use this right as the basis for diminishing labor's rights, then there must inevitably develop hostility to the whole concept of exclusive management rights." (emphasis supplied)

It was not until a year after its original decision in the present case that the Board, in *Town and Country Manufacturing Company, Inc., supra,* conceived the view to which it now adheres that there is a duty to bargain about any management decision having an impact upon bargaining unit jobs. Shortly after its *Town and Country Manufacturing Company* dictum, the Board, in reliance thereon, held in *Renton News Record,* 136 NLRB 1294 (1962), that a publisher must bargain about whether to set type by a different process than that theretofore employed. It explained:

> ". . . the impact of automation on a special category of employees is a matter of grave concern to them. It may involve not only their present but their future employment in the skills for which they have been trained." 136 NLRB at 1297.

Since then, the Board, for like reasons, has held that an employer must bargain about whether to discontinue his business because of financial difficulties (*Lori-Ann of Miami,* 137 NLRB 1099 (1962)), about whether to sell his product through independent distributors rather than through a sales force of his own (*Adams Dairy, Inc.,* 137 NLRB 815 (1962), enf. den. 322 F.2d 553 (8th Cir. 1963)), about whether to ship by common or contract carrier rather than by his own trucks (*American Manufacturing Company of Texas,* 139 NLRB 815 (1962); *Brown Transport Corporation,* 140 NLRB 954 (1963)), about whether to sell all or a part of his business (*Weingarten Food Center of Tenn., Inc.,* 140 NLRB 256 (1962); *Star Baby Co.,* 140 NLRB 678 (1963)), about whether to transfer particular work from one plant to another (*West Side Lumber Co.,* 144 NLRB No. 14 (1963)), and about whether to purchase for distribution a product already packaged rather than pack-

age the product himself (*Winn-Dixie Stores, Inc.*, 147 NLRB No. 89 (1964)).[6]

The Board's new concept of the scope of mandatory bargaining is, we submit, without basis in the language of the Act. The Act does not require bargaining about all matters having "impact" upon employment or employees. It requires bargaining only about "wages, hours and other terms and conditions of employment." As this Court said in *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958):

> "The duty is limited to those subjects . . . As to other matters, . . . each party is free to bargain or not to bargain." (356 U.S. at 349)

In the foregoing case, this Court had before it a problem analogous to that before it now. As pointed out in the dissent therein, the timing of a strike vote and the manner in which it is taken "affects the employer-employee relationship in much the same way" as a "no strike" clause (356 U.S. at 353). Nevertheless, the Court held that an employer's proposed clause governing strike votes was not one upon which bargaining was required because "It settles no term or condition of employment" (356 U.S. at 350).[7]

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6. Contrast these holdings with the remarks quoted in note 5, p. 16, *supra*. In cases upon which the Board itself has not yet passed, trial examiners have held that an employer must bargain about whether to serve a particular market area from one distributing plant rather than another (*Shell Oil Company*, NLRB Case No. 7-CA-4359) and about whether to terminate a contract with a customer (*William J. Burns International Detective Agency, Inc.*, NLRB Cases Nos. 17-CA-2145 and 2161).

7. A like question would be presented by an employer proposal limiting the amount of the dues that a union may charge. A provision for a checkoff of union dues, establishing, as it does, a term of employment dealing with wages, is clearly a subject upon which bargaining is required. Just as clearly, an employer may properly insist upon a limit upon the amount which he will be required to check off. However, it would be something else again for him to propose a limit upon the amount that the union may charge; the

An employer's decision to let the performance of given operations to an independent contractor undoubtedly has an impact upon employment, present or potential, both in his own operations and in those of the contractor. However, his decision fixes no term or condition of employment. It is not even, of itself, a decision to terminate individuals presently employed. The work may always have been contracted out, or it may be work in excess of the capacity of the existing work force. And even where, as in the present case, the effect is to deprive an employee of the particular work which he has been doing, his tenure of employment is affected by its removal only if the employer fails to provide him with other work. It is for this reason that the Board, in the past, has required bargaining only about the provision of other work (or, in the alternative, termination pay). There are reasons for doubting that the Board was correct in going even this far,[8] but this is a question not here presented and with which, therefore, we need not concern ourselves; Fibreboard has been convicted of a refusal to bargain, not about the provision of other work or termination pay, but about its decision to let the contract.

B. The Board's new concept of the field in which bargaining is mandatory would obliterate all boundaries; there would be no subject about which bargaining, if permissive, would not be mandatory.

If the Board's new concept is correct, then, contrary to this Court's decision in the *Borg-Warner* case, the subjects of mandatory bargaining are without limit. We say this because it is impossible to conceive of a business decision

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latter proposal, notwithstanding its impact upon the amount he would be required to deduct from wages, would fix no term or condition or employment and clearly would not be one upon which bargaining is required.

8. See dissent in *Town and Country Manufacturing Co., supra,* 136 NLRB at 1034.

which would be without impact upon employment or employees. A manufacturer's purchase from others of component parts for his product has precisely the same impact upon employment as does the letting of work to an independent contractor or its transfer to another plant. So does discontinuance of an unprofitable line. A corporate merger has precisely the same impact upon employees of the corporation losing its identity as a sale of its business and assets.[9] So does a petition in voluntary bankruptcy. Rejection of a customer order has precisely the same impact upon employment as would acceptance of the order and its assignment to an independent contractor or to another plant. Rejection of a job by a contractor has precisely the same impact upon his employees and their employment as the letting of a job has upon employees of the employer who lets it. The unquestionable impact of their subject matter upon wages, hours and conditions of employment has been the basis in times past of union demands governing or restricting the sale by an employer of his products (see, e.g., *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950)) or the kinds of merchandise in which he may deal (see, e.g., *Alpha Beta Food Markets v. Amalgamated Meat Cutters*, 147 Cal. App. 2d 343, 305 P.2d 163 (1956)) or the hours during which he may do business (see, e.g., *Jewel Tea Co. v. Associated Food Retails of Greater Chicago, Inc.*, 331 F.2d 547 (7th Cir. 1964); *Kold Kist, Inc. v. Amalgamated Meat Cutters*, 99 Cal. App. 2d

9. See *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). In holding an employer guilty of a refusal to bargain about a sale of assets, a trial examiner has said that "sales, or *mergers*, or other dispositions of facilities in our rapidly changing economy have such an obvious, direct and devastating impact on the jobs of employees that they fall within the principle relied upon by the Board in subcontracting cases." *United Dairy Co.*, 1963 Daily Lab. Rep. No. 107, at D-1, Case No. 6-CA-2551; emphasis supplied.

191, 221 P.2d 724 (1950)) and demands aimed at price and market control (see. e.g., *Allen Bradley Co. v. Local Union*, 325 U.S. 797 (1945)).

An employer must bargain about the wages, hours and terms and conditions of employment, not only of individuals currently on his payroll, but also of individuals as yet unidentified whom he might employ or consider for employment in the future. Hence, if there is a duty to bargain about matters having an "impact" upon employment, that duty extends to matters having an impact upon "future employment" as well as present. *Renton News Record, supra,* 136 NLRB at 1297. It therefore is immaterial that because of an expanding workload, the letting of work to an independent contractor or its assignment to another plant will be without impact upon the employment of individuals currently on the payroll; the employer nevertheless must bargain.[10]

Nor is that duty limited to cases in which it is the employer who desires a change. If there is a duty to bargain about whether to contract out work, transfer it to another plant, close or move a plant, discontinue a product, purchase components from others, or sell the business, then the employer must bargain upon a union demand that he do so. And conversely, he must bargain upon a union demand that he discontinue an existing practice of letting some of his work to independent contractors, or of having it done in another plant, or of purchasing particular com-

10. In *Shell Oil Company, supra,* note 6, the trial examiner held that the employer was under a duty to bargain about a decision to serve its customers in Lansing, Michigan, from its distributing plant at Grand Haven rather than from its plant at Detroit as in the past. The trial examiner so held notwithstanding the fact that because of an increasing volume of work at Detroit, the transfer of Lansing deliveries to the Grand Haven plant did not result in termination of any Detroit employees.

ponents from others, or of utilizing labor saving machinery or processes.

An employer can derive little comfort from the Board's glib assertion that "prior discussion with a duly designated bargaining representative is all that the Act contemplates." In the court below it developed that "prior discussion" means bargaining to "impasse" (R. 174, 175). An employer will be fortunate if he has only one union with which he must deal; Petitioner had five,[11] and if its decision had been one affecting production as well as maintenance workers, it would have had thirteen.[12] A reasonably skilled union negotiator knows how to fence when it suits him to do so, and union negotiations may be, and often are, protracted. The Board's decision means that the pace at which an employer does business will be limited to the pace set in bargaining by the union or unions with which he must deal. It means that if a union is dissatisfied with the outcome, it will be free to strike or picket and will have the protection of the Act in so doing. Even more serious is the fact, demonstrated by the present case, that no matter what discussions may have been had, the employer can make and effectuate his decision only at the risk that some years later[13] what he has done will be ordered

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11. The Steelworkers, the Steamfitters Union, the Ironworkers Union, the Carpenters Union, and the Electricians Union. See note 1, p. 3, *supra*.

12. Petitioner had eight bargaining units of production workers, represented, respectively, by the Oilworkers Union, the Printing Specialties Union, the Pulp and Sulfide Workers Union, the International Longshoremen's and Warehousemen's Union, the Paintmakers Union, the Sheet Metal Workers Union, the Teamsters Union, and the Associated Chemists (R. 102).

13. Cases decided by the Board in 1958 involved an average elapsed time of nearly one and one-third years (465 days) between issuance of the complaint and rendition of the Board's decision and almost two and one-half years between issuance of the complaint and

undone because the Board's interpretation of those discussions fails to satisfy in some respect its notions of bargaining. The dissent from the supplemental decision put the matter accurately (R. 32):

> "The time involved in extensive negotiations and in protracted litigation before the Board, together with the numerous technical vagaries, practical uncertainties, and changing concepts which abound in the area of so-called 'good faith bargaining,' make it impossible for management to know when, if, or ever, any action on its part would be clearly permissible. These factors, together with the crushing, burdensome remedy, which this Agency will retroactively impose upon a given enterprise, should the National Labor Relations Board determine that the action of management was (for whatever reason) improperly taken, will serve effectively to retard and stifle sound and necessary management decisions. Such a result, in my opinion, is compatible neither with the law, nor with sound business practice, nor with a so-called free and competitive economy."

C. This Court has never held that an employer must bargain about the composition of his business, but has recognized that he has the right, acting independently of unions representing his employees, to rearrange his business as he sees fit.

The Panel majority regarded the question whether Fibreboard was under a duty to bargain about whether to let the contract as being "foreclosed" by the decisions of this Court in *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960); *Teamsters Union v.*

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a court decree enforcing or setting aside the Board order. *Report of Advisory Panel on Labor-Management Relations Law to the Senate Committee on Labor and Public Welfare*, Sen. Doc. No. 81, 86th Cong. 2nd Sess., p. 10 (1960). In the present case, the elapsed time between issuance of the complaint and rendition of the Supplemental Decision was approximately three years. It has now been nearly five years since the complaint was issued.

Oliver, 358 U.S. 283 (1959), 362 U.S. 605 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). However, none of these cases is controlling.

In the *Telegraphers* case, the Court held that the Norris-LaGuardia Act precluded issuance of an injunction against a strike to force amendment of a bargaining contract to prohibit the discontinuance of existing positions. The decision was based upon the ground that the case presented a "labor dispute" within the meaning of the Norris-LaGuardia Act, which is to be broadly construed, and that the Union's demand was not rendered unlawful by the Railway Labor Act or any other federal statute.

To hold that the Norris-LaGuardia Act deprives a federal court of jurisdiction to enjoin a strike is not to hold that the demand in support of which the strike was called is one over which the employer must bargain. *Lauf v. Shinner*, 303 U.S. 323 (1938). As said in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205 (1962), the Norris-LaGuardia Act is not limited to the protection of collective bargaining.

Nor does the fact that a demand is lawful mean that it is one over which bargaining is required. *NLRB v. Wooster Division of Borg-Warner Corporation, supra.*

The only thing in the Court's opinion that could possibly be taken to mean that the Railway Labor Act required bargaining over the union's demand was a brief statement by way of dictum that "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effect to settle all disputes 'concerning rates of pay, rules and working conditions.'" 362 U.S. at 339. We refer to the foregoing as a dictum because applicability

of the Norris-LaGuardia Act does not depend upon the existence of a duty to bargain about the subject in controversy (see *Sinclair Refining Co. v. Atkinson, supra*), and the question whether there was such a duty was not presented. Another decision of this Court contains a dictum contrary to that above quoted.[14]

If the *Telegraphers* case were nevertheless to be regarded as holding that the Railway Labor Act imposes a duty to bargain over a legitimate business decision to close or move a plant or contract out a part of the operations, the fact would remain that it most certainly did not hold that any such duty is imposed by the National Labor Relations Act. The latter Act is "a quite different law." *Sinclair Refining Co. v. Atkinson, supra,* at 211.

Teamsters Union v. Oliver, which was before the Court on two occasions; involved questions as to the validity under the Ohio antitrust laws of certain provisions of a bargaining contract between the Teamsters Union and a motor carrier. The provision first considered was one which fixed the minimum truck rental to be paid a driver-owner while driving his truck in the carrier's service; operation of the provision was "narrowly restricted . . . to the times when the owner drives his leased vehicle for the carrier." (358 U.S. at 293.) The effect of the provision, in conjunction with that governing wage rates, was to fix

14. In *Virginian Railway Co. v. System Federation,* 300 U.S. 515 (1937), the Court, in commenting upon the effect which a strike in the railroad's "back shops" would have upon commerce, said:

> "It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. *Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management.* It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act." 300 U.S. at 557 (emphasis supplied).

the minimum compensation payable for the services of the driver and the use of his truck and thus prevent circumvention of the wage provision by payment of an inadequate truck rental. Since the provision dealt with wages, it was held to be within the scope of mandatory bargaining and, therefore, immune from the state antitrust law.

The provisions before the Court on the second occasion restricted the carrier's right to use hired trucks. In a one-paragraph *per curiam* opinion granting certiorari and disposing of the merits, the Court said that "these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions" (362 U.S. at 606). If the Court meant by this that the question whether an employer may rent or lease equipment from others is intimately bound up with the question of what wages are to be paid his employees, we suggest that this is untrue. Furthermore, the question whether the contractual provisions under attack dealt with subjects about which bargaining was mandatory was not presented. It was sufficient to deprive the State of power that the conduct in question was "arguably" protected by section 7 of the Act or condemned by section 8; the question whether it was actually so protected or condemned was for the Board to decide in the first instance and, hence, was "outside the scope of this Court's authority." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Accord: *Garner v. Teamster's Union*, 346 U.S. 485 (1953); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

In *United Steelworkers v. Warrior and Gulf Navigation Co.*, the Court held only that a contractual provision for arbitration of any difference as to the "meaning and application of the provisions of the agreement" required arbitration of the union's contention that the contract

deprived the employer of its right to let work to an independent contractor no matter how lacking in merit that contention might be. The decision was without bearing upon the question presented by the instant case. However, in the course of its opinion, the Court remarked that "Contracting out work is the basis of many grievances," and the Board, in the present case, seized upon that remark to conclude (R. 24):

> "As the Supreme Court has noted, subcontracting or contracting out is a subject extensively dealt with in today's collective bargaining. The present decision does not innovate; it merely recognizes the facts of life created by the customs and practices of employers and unions."

We question the accuracy of the Board's statement that "contracting out is a subject extensively dealt with in today's collective bargaining." Union contracts restricting the right to contract out work are, in fact, uncommon.[15] It undoubtedly is true that an employer occasionally will yield to a union demand for inclusion in their contract of a provision regarding which bargaining is not required by law. However, as the Board itself has held, the question whether a union proposal is one upon which bargaining is required does not depend for its answer upon whether the union has been successful in obtaining its inclusion in

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15. A study by the Department of Labor of 1,687 collective bargaining agreements in effect in 1959 reveals that "fewer than one out of four major agreements in effect in 1959 made any reference to subcontracting" and that "only 4 . . . prohibited the practice outright." Bulletin No. 1304, United States Department of Labor, August, 1961. Indicative of what was the practice of most employers is the fact that following the Board's *Town and Country* decision, there was a flood of cases complaining of unilateral action by employers in contracting out work. There were 26 such cases pending before the Board at the time we wrote our petition for certiorari (see Pet. for Cert. p. 13).

contracts with other employers (*Locals 164, 1287 and 1010, Brotherhood of Painters, Decorators and Paperhangers of America,* 126 NLRB 997, 1002, n.4 (1960), enf. 293 F.2d 133 (D.C. Cir. 1961), cert. den. 368 U.S. 824 (1961)). As in *Sinclair Refining Co. v. Atkinson, supra,* the question here presented is dependent for its answer, not upon "the prevailing circumstances of contemporary labor-management relations," but upon "a correct judicial interpretation of the language of the Act as it was written by Congress" (370 U.S. at 202).

There has not heretofore been presented to this Court either the general question whether the Act requires bargaining about the nature and extent of the business operations in which an employer is to engage, or the specific question, embraced by the general, whether the Act requires bargaining about whether he shall let work to an independent contractor. However, in *Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), in which the Court held that the corporation surviving a corporate merger was bound by the arbitration provision of the union contract of the other party to the merger, the Court explained (at page 904):

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that *the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers* be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and

> industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.' " (emphasis supplied)

As demonstrated by this Court's decision in the *Borg-Warner* case, *supra,* there exists somewhere a line dividing subjects about which bargaining, although permissible, is not required, from subjects about which bargaining is mandatory. The line which the Board, until its dictum in *Town and Country Mfg. Co.,* drew between questions as to the nature, extent or location of the operations in which an employer is to engage, and questions as to the wages, hours and terms or conditions upon which men are to be employed in those operations, gave effect to the language of the Act as written by Congress. Employees were not left without needed "protection . . . from a sudden change in the employment relationship"; the requirement that their representative be given advance notice of the change and an opportunity to bargain over protective measures such as the provision of other work or termination pay met that need while preserving "the rightful prerogative of owners independently to rearrange their businesses." *Wiley & Sons v. Livingston, supra.*

In contrast, the Board's new concept of the bargaining duty would obliterate the line between questions as to the composition of the employer's business and questions as to the terms and conditions upon which men are to be employed therein, and would distort beyond recognition the language of the Act. Indeed, if given the full effect for which its rationale calls, the Board's new concept would deny the existence of any limit whatever to the area in which bargaining is required.

D. The contemporaneous administrative interpretation of the Act as not requiring an employer to bargain about the composition of his business withstood the test of twenty-seven years and two general revisions of the Act.

Until its dictum in *Town and Country Manufacturing Company, Inc., supra*, decided twenty-seven years after enactment of the Wagner Act, it was settled Board doctrine, as we have hereinbefore indicated, that an employer is not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant.

In *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941), the employer, in the past, had sought unsuccessfully to obtain the union's agreement to a reduction in wage costs. In had then, from time to time, contracted various of its manufacturing operations to a plant, which it ultimately acquired, in another locality where wage costs were lower, and from time to time it had moved machinery and equipment to the new plant until the old plant was completely closed. Upon learning that work had been contracted out, the union asked the employer to bargain over the matter, offering in this connection to negotiate a wage decrease, but the employer replied "that the matter was no longer open to negotiation." 34 NLRB at 1000-1001. Upon learning of the contemplated removal of machines and equipment, the union asked the employer "to negotiate with respect to the proposed removal," but the employer "flatly refused to negotiate concerning their removal." 34 NLRB at 1002. Later, the union again "sought to negotiate regarding the removal of further machinery and equipment," but the employer "refused to discuss the matter." 34 NLRB at 1004. The Board found that the removal "resulted from a desire to diminish or avoid loss by having the work performed at a lower labor cost" and held that the employer's "refusal on and after November 8, 1937,

to negotiate concerning the transfer or removal of operations from the Detroit to the Hamburg plant did not constitute a refusal to bargain collectively." 34 NLRB at 1007.

The employer also had refused on several occasions to discuss with the union the matter of transferring employees to the new plant. These refusals, the Board held, stood "on another footing" and "constituted refusals to bargain collectively, within the meaning of Section 8(5)." 34 NLRB at 1007.

In *Mahoning Mining Company*, 61 NLRB 792 (1945), where an employer who had a union agreement covering three mines let the operation of two of the mines to an independent contractor without advising the union and, upon renewal of the union agreement, refused to negotiate regarding employees at these two mines, the Board reversed the trial examiner's finding that the employer had refused to bargain and held:

> "Since changing conditions in industry necessitate revision of bargaining units which will best effectuate the policies of the Act, the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change." 61 NLRB at 803.

In *Walter Holm & Company*, 87 NLRB 1169 (1949), where the employer, following certification of the union as the bargaining representative of its truck drivers, leased the trucks to its drivers as independent contractors without prior notice to the union and then refused to negotiate an

agreement with the union on the ground that the drivers were no longer its employees, the Board, in reversing a contrary conclusion by the trial examiner, held:

> "Section 8(a)(5) does not require an employer to consult with its employees' representative as a prerequisite to going out of business for nondiscriminatory reasons." 87 NLRB at 1172.

The Board went on to hold that the alleged independent contractors were in fact employees and that for that reason, but for that reason only, the employer had been guilty of a refusal to bargain.

In *Celanese Corporation of America,* 95 NLRB 664 (1951), the employer had contracted out its maintenance work without consulting the union. The Board, in holding that the employer had not thereby refused to bargain, adopted the findings and conclusions of the intermediate report wherein the trial examiner, after referring to the cases of *Mahoning Mining Company* and *Walter Holm & Company,* both *supra,* concluded:

> "... the Company was not required to consult with the Union as the representative of its employee before entering into this contract any more than if it was going out of business for nondiscriminatory reasons." 95 NLRB at 713.

In *Krantz Wire & Mfg. Co.,* 97 NLRB 971 (1952), where the employer leased the physical facilities of his business to another employer and terminated his employees without prior notice to the union, the Board adopted the trial examiner's report absolving the employer, in these words, of a charge of refusal to bargain:

> "An employer is free to close his plant and discharge his employees for any reason or for no reason at all, provided only that he does not do so with the purpose of discouraging or encouraging union membership, or

> otherwise interfering with the exercise by his employees of the rights guaranteed in Section 7 of the Act. Where he closes his plant for legitimate business reasons the Act does not require that he consult with his employees' representatives as a prerequisite to going out of business." 97 NLRB at 988.

In *National Gas Company,* 99 NLRB 273 (1952), where the employer, "while maintaining that the decision to contract out the installation work was not a bargainable matter, readily recognized the interest of the Union in the problem of the displaced men" (99 NLRB at 277), neither General Counsel nor the Union challenged the trial examiner's holding that the employer was under no duty to bargain about its decision to contract (ibid.), and the Board held the employer guiltless of a refusal to bargain because

> ". . . the precise issue over which the parties reached an impasse at the May 2 meeting did not concern the question of the re-employment of the installation men, but related to the question of whether the Respondent's decision to contract out all its installation work should stand or be withdrawn." 99 NLRB at 278.

And finally, of course, there was the Board's original decision in the instant case, in which it concluded (R. 38):

> ". . . although the statutory language is broad, we do not believe it so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort."

In its *Town and Country Mfg. Co.* decision, *supra,* the Board majority referred to *Timken Roller Bearing Co.,* 70 NLRB 500 (1946) as having held the contrary. There it

had been the employer's practice since prior to advent of the union to contract out certain of its work. The employer rejected the union's request for a meeting to discuss this practice, thereby refusing to discuss any aspect of the matter. The Board's order holding the employer guilty of refusing to bargain about this and other matters was vacated by the Court of Appeals because the union, if it had any just cause for complaint, should have followed the grievance procedure for which its bargaining contract provided. *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (6th Cir. 1947). The Board devoted little attention to the contracting question (it was but one of the many involved in the case) and it apparently did not intend to hold anything more than that there was a duty to bargain about the effect of contracting upon tenure of employment and hours of work.[16] The case was both preceded and followed by decisions clearly and explicitly holding that an employer is under no duty to bargain about a decision to contract out work (as contrasted with measures designed to ease the impact upon employees), and it was not until *Town and Country Mfg. Co.*, decided some sixteen years later, that the Board conceived of *Timken Roller Bearing Co.* as having held the contrary.

A long-standing administrative interpretation of a statute (and twenty-seven years should satisfy the requirement

16. The Board spoke of the employer as having refused to bargain "*regarding* the subcontracting of work" and ordered that it desist from refusing to bargain "*with respect to* . . . the sub-contracting of work." (70 NLRB at 504-505; emphasis supplied.) In California Footwear Company, 114 NLRB 765, 766 (1955), the Board used similar language (saying that the employer was under a duty to bargain "*with respect to*" a plant removal), where it was plain from the context that it was talking only about bargaining about the transfer of employees. The Board's language is not always precise.

of longevity) should not be overturned except for very cogent reasons; this is particularly true where, as here, the interpretation originated early in the administration of the statute with men who presumably were familiar with the congressional purpose and at a time when recollection of that purpose was still fresh.[17] *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956). The statute, we submit, does not change meaning with a change in the membership of the Board.

But here we have more than an administrative interpretation standing alone; we have congressional approval. The Act, from the beginning, has contained in section 9(a) the following provision (29 U.S.C. § 159(a)):

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

In 1947, and again in 1959, Congress considered in great detail the provisions of the earlier legislation as it had been applied by the Board (see H.R. Rep. No. 245, 80th Cong., 1st Sess.; S. Rep. No. 105, 80th Cong., 1st Sess.; S. Rep. No. 187, 86th Cong., 1st Sess; H.R. Rep. No. 741, 86th

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17. Of the three members of the board which decided *Brown-McLaren Manufacturing Company, supra*, p. 30, in 1941, one (Edwin Smith) had served from the beginning, and another (William Leiserson) had served since 1939. Of the five members of the boards which decided *Walter Holm & Company, supra*, p. 31, in 1949, and *Celanese Corporation of America, supra*, p. 32, in 1951, three (Paul M. Herzog, John M. Houston and James J. Reynolds, Jr.) had served while the 1947 revision of the Act was being considered by Congress. Two of those three (Herzog and Houston) were still members of the Board in 1952 when it decided *Kranz Wire & Mfg. Co., supra*, p. 32, and *National Gas Company, supra*, p. 33.

Cong., 1st Sess.). Although the Board had rendered two of the decisions to which we have referred prior to 1947 and had rendered the others prior to 1959, Congress did not on either occasion see fit to change the rule enunciated and applied in those decisions. It is a fair implication that in 1947, by incorporating in section 8(d) substantially the same language as had been used in section 9(a), and, in 1959, by re-enacting both sections without pertinent modification, Congress accepted and approved the administrative construction which had been placed thereon. *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

E. The decisions of the Board and of the court below are based upon a mistaken premise as to the nature of collective bargaining and the status of the bargaining representative.

The court below apparently attributed significance to the fact that Petitioner, in contracting out the work, "extinguished the entire collective bargaining unit" (R. 175). But in *Walter Holm & Company, supra*, p. 31, and in *Krantz Wire & Mfg. Co., supra*, p. 32, the fact that the entire bargaining unit was extinguished by the employer's unilateral action did not deter the Board from holding that the employer had been under no duty to bargain about it.

If the fact that the entire bargaining unit was extinguished has significance, its significance is exactly the opposite of that which the court below gave it. A bargaining representative exercises only the collective rights of those whom it represents. The individual has the power to withhold services desired by an employer and the concomitant right to bargain about the terms upon which his services will be made available. His right to bargain about those terms obviously is dependent for its existence upon his

power to withhold, and it is that power, exercised collectively through a union, that is the heart of collective bargaining. As the Court said in *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 489:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.'"

As accurately stated in the Senate Report at the time of passage of the Taft-Hartley Act:

> "The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement." S. Rep. No. 105, 80th Cong., 1st Sess. p. 16.

As above stated, the right of the individual to bargain about the terms upon which he will perform the services which he has to offer is simply a concomitant of his power to withhold those services. Where his services are unwanted, his power to withhold them is meaningless. He has no con-

comitant right to force them upon the employer or to insist that the employer bargain for their performance, and the Board, in holding that a union is entitled to required bargaining about the utilization of services which the employer does not want, has held that the bargaining representative is entitled to exercise on behalf of those whom it represents a right which they do not possess.

The Board's decision is the product of a mistaken notion as to the powers and function of the bargaining representative. Selection of a bargaining representative simply collectivizes the bargaining positions of the individuals and requires that the employer deal with the chosen representative. In the words of this Court:

> "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944).

An employer may not by-pass the bargaining representative and deal with the employees directly, for since the obligation to deal with the chosen representative is exclusive, "it exacts the negative duty to treat with no other." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 683-684 (1944); see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937). But the exclusive power to exercise collectively the rights of the individuals does not confer upon the bargaining representative rights which the individuals do not possess. The status of a bargaining representative is analogous to that of a guardian of the person. An employer desiring the services of a ward must bargain with the guardian, rather than the ward, as to the terms and

conditions of employment, but if the employer does not want the services, there is nothing to bargain about and he need bargain with no one.

Where an employer wishes to continue a part of the operations embraced by the bargaining unit and thus has need of a part of the services controlled by the bargaining representative, the power to withhold the services which are needed may provide a basis upon which to bargain for utilization of the services which are unwanted. But where, as here, all of the operations embraced by the unit are discontinued and the unit thereby extinguished, there exists no such basis for bargaining. We submit that a union's power to withhold services does not carry with it a right to require bargaining for the utilization of those services by an employer who does not want them. The language of the Act imposes no such requirement, and neither does its rationale.

II. The Board's order that Petitioner resume the performance of operations which had been discontinued for legitimate business reasons and that it reinstate the individuals who had been employed therein violates section 10(c) of the Act and is punitive.

This is the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving only a refusal to bargain.[18] It also is the first instance in which the Board has ordered the resumption

18. In the past, the remedy for a refusal to bargain had been simply an order requiring bargaining. Thus, where an employer moving his plant violated his duty to bargain regarding placement of affected employees (tenure of employment), the employer was ordered only to bargain regarding such placement (see, e.g., *Brown Truck & Trailer Mfg., Inc., supra* p. 14) and sometimes even this remedy was denied. (see e.g., *Bickford Shoes, Inc., supra* p. 15). Even after its dictum in *Town & Country Manufacturing Co.*, the Board, in *Renton News Record, supra* p. 21, declined to require the employer to resume its discontinued type-setting operations and

of operations which have been discontinued for legitimate business reasons.[19]

While its novelty does not of itself condemn the remedy, the fact that it took the Board twenty-seven years to discover it invites a scrutiny which it will not withstand. The order, we submit, violates section 10(c) of the Act (29 U.S.C. § 160(c)), and is punitive rather than remedial.

A. In requiring reinstatement of employees terminated for legitimate business reasons, the order violated the Act's express prohibition of compulsory reinstatement of employees terminated for cause.

Section 10(c) of the Act contains the following provision, added in 1947 (29 U.S.C. § 160(c)):

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause."

In ordinary usage, the word "cause," when employed (as it is in the foregoing provision) to refer to that which

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reinstate the individuals who had been employed therein for the reason that such an order would be "punitive" (136 NLRB at p. 1298). See also *Lori-Ann of Miami, supra* p. 17, where the employer was ordered only to bargain.

19. Even where the discontinuance of operations was itself "discriminatory" and violative of Section 8(a)(3) of the Act, it was the Board's normal practice, not to order resumption of the operations, but to order only that the terminated employees be placed upon a preferred list for reemployment in the event of a voluntary resumption of the operations. See, e.g., *New Madrid Manufacturing Co.*, 104 NLRB 117 (1953), enf. granted in part and den. in part, 215 F.2d 908 (8th cir. 1954); *Barbers Iron Foundry*, 126 NLRB 30 (1960); *M. Yoseph Bag*, 128 NLRB 211 (1960), 139 NLRB No. 108 (1962). In *Darlington Manufacturing Co.*, 139 NLRB No. 23 (1962), which was decided after *Town and Country Manufacturing Co.* and in which a plant had been closed in violation of Section 8(a)(3), the Board did not order that the plant be reopened, but ordered only that the employees who had been terminated be placed upon preferred lists for employment at other plants. The Court of Appeals of the Fourth Circuit denied enforcement even of this order (325 F.2d 682 (1963)) and this Court has granted certiorari, 377 U.S. 903 (1964).

induces given action, is synonymous with "reason." Webster's International Dictionary (2d Ed. 1959). The legislative history of the provision reveals that it was intended to refer, not merely to individuals discharged for misconduct, but to individuals discharged for any legitimate reason—or, to be more specific, for any reason other than participation in activity protected by section 7. As Senator Taft explained it on the Senate floor, there were, for the purposes of the remedial provisions of the Act, just two kinds of discharge: discharges for "union activity" and discharges for cause. The Board was to be empowered to order reinstatement in the one kind of case but not in the other.

> "All this language does is simply to say exactly what the present rule is. *If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome.* The Board must determine the facts in every case. For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provision of law . . ." 93 Cong. Rec. 6518 (1947); emphasis supplied.

The existing law to which Senator Taft referred had been expounded by this Court in *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, and in *Associated Press v. NLRB*, 301 U.S. 103, both decided on the same day in 1937. In *Jones & Laughlin*, the Court had said:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled

> to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." 301 U.S. at 45, 46.

And in *Associated Press*, it had said:

> "The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees . . . The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever its relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." 301 U.S. at 132.

See also *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

The Board has found in the present case that Fibreboard did not terminate its maintenance employees because of their union membership or to interfere with, restrain or coerce them in the exercise of their rights under the Act, but that it terminated them for legitimate business reasons. Senator Taft was not asked specifically whether section 10(c) would permit enforced reinstatement of an individual discharged for legitimate business reasons, but his explanation leaves no doubt (and could have left none in the minds of his colleagues) as to how he would have answered such a question. If a discharge was not for what he termed "union activity," then it was for "cause" and the Board was to be without power to reinstate.

B. The Board's order was punitive rather than remedial and exceeded its powers for this reason as well as for the reason just stated.

By the terms of the Board's order, Petitioner must terminate its contract with Fluor Maintenance Company, resume performance of the maintenance operations, and reinstate

the individuals formerly employed therein with back pay to the date of the order. It is then to bargain with the Union, after which it "may, of course, lawfully subcontract its maintenance work" (R. 25).

The order was based upon the following premises: (1) that "No genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has been made and implemented," (2) that "the loss of employment stemmed directly from their employer's unlawful action in by-passing their bargaining agent," and (3) that the order does not impose an "undue or unfair burden on Respondent." (R. 25, text and note 19.)

We do not know why there can be no "genuine bargaining" without an award of back pay. Such an award has no bearing that we can see upon ability of the parties to bargain effectively and, we submit, it is not in aid of bargaining.

Nor do we know why there can be no "genuine bargaining" without a prior resumption of operations and reinstatement. Petitioner, it has been found, is interested in operating profitably, not in discriminating against the Union or its members. If the Union has something to propose that might be attractive to Petitioner, there is nothing in the circumstances presently existing that would preclude such a proposal from receiving consideration as favorable as that which it would receive after enforced resumption by Petitioner of the maintenance operations.

Indeed, the requirement that bargaining be preceded by a resumption of operations and reinstatement is self-defeating. No man worth his salt would have failed to secure other employment during the three years which had elapsed between his termination and the Board's order. And no such man would consider leaving that employment to return

to Petitioner at 1959 wage rates and with knowledge that Petitioner, after an appropriate interval of bargaining, might again contract out the work and leave him without a job. He would consider leaving his present employment to return to Petitioner only if and when Petitioner and the Union had struck a bargain for the payment of an attractive wage rate and providing reasonable assurance of something more than purely temporary employment. The Board, in requiring that bargaining be preceded by a resumption of operations and reinstatement, has required that the horse be preceded by the cart.

Nor is there any basis in the record for the Board's assertion that "the loss of employment stemmed directly" from the refusal to bargain. That assertion assumes that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work. The Board might with equal justification have assumed that bargaining would have resulted in acceptance by Petitioner of the Union's wage and other demands. There was no more warrant for the Board's assumption that bargaining would have resulted in abandonment of the plan to contract out the work than there was for a similar assumption which caused this Court to overturn a Board order in the completely analogous case of *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).[20] See also *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961).

The court below speculated that "the union, after hearing management's side of the problem, . . . might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained

20. An order that the employer cease giving effect to certain contracts with the International Brotherhood of Electrical Workers was vacated by this Court because based upon the "unwarranted assumption" that "the contracts were the fruit of the unfair labor practices" (305 U.S. at 238).

with a reduced force to effect the economies desired by management" (R. 177). But the fact is, as the Board found, that the Union *did* hear management's side of the problem[21] and that it made no proposal such as that which the court below envisioned.[22] Nor does the record suggest that such a proposal, if it had been made, would have been acceptable to management; the Union had already had a "trial period" of more than twenty years (R. 46) during which management's repeated efforts to obtain its cooperation in effecting a reduction in costs had been fruitless.[23] The evidence con-

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21. The Board adopted as its own the Trial Examiner's findings that Petitioner's Director of Industrial Relations reminded the Union's negotiating committee "that during the bargaining negotiations in previous years he had, with the use of charts and statistical information, endeavored to point out 'just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant' and that as late as 1958, he had stated to the negotiating committee, again with the aid of charts, Respondent's problem of high costs" (R. 53-54), that he told the committee "that certain other unions representing Respondent's employees 'had joined hands with management, thereby bringing about an economical and efficient operation,' but the Steelworkers, even though asked to do so, refused to cooperate in attempting to reduce maintenance costs" (R. 54), and that after reiterating his statements "about the 'high cost' problems management had in the plant," he told the committee "that Respondent was convinced, after considering the matter for 'quite a period of time,' that it was more economical to have some independent contractor perform the maintenance work instead of continuing to perform that work with its own employees" (R. 54).

22. Although the Union found opportunity to propose amendment of its bargaining contract to require that the independent contractor employ its members (R. 54), it made no proposal bearing upon a reduction in costs, but took and adhered to the position that its bargaining contract had been automatically renewed subject only to an obligation upon the part of Petitioner to bargain upon its demands for modifications (R. 51, 53) which involved increases in all cost items in the contract (R. 61). The cost savings involved in letting work to a specialized maintenance contractor serving more than one plant in the area is the result, not merely of lower wage rates (the contractor's wage rates may, or may not, be lower), but of a flexible work force and specialized management and supervision (R. 139-141). It was not within the Union's competence to offer anything more than reduced wages, and it did not offer even this.

23. See note 21, *supra*.

tains no indication that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work, and the Board did not, as required by section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)), state findings of fact and reasons therefor which would support such a conclusion. Speculation, without basis in the evidence or findings, that bargaining would have had one outcome rather than another is, we submit, not a proper basis for a Board order. See *Consolidated Edison Co. v. NLRB* and *Carpenters Local 60 v. NLRB*, both *supra*.

As for the Board's assertion that its order imposed no "undue or unfair burden" on Petitioner, the fact is that it required Petitioner, after the lapse of three years and laboring under the recruitment difficulties above mentioned, to rebuild a supervisory and working force with which to resume, with no prospect of reduced costs, the performance of an operation which had been abandoned as too costly.

An order which goes beyond what is required to undo a wrong is punitive rather than remedial and exceeds the Board's powers. *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, *Carpenters Local 60 v. NLRB*, both *supra*. The only wrong (if it was a wrong) of which Petitioner was convicted was a refusal to bargain about whether it should let the maintenance work to an independent contractor. All that was necessary to undo that wrong was an orthodox order that Petitioner bargain. The requirement that bargaining be preceded by a resumption of operations which had been abandoned as too costly and by reinstatement with back pay of employees who had been terminated because their services were no longer needed is, we submit, punitive.

CONCLUSION

We submit that the Act does not require an employer to bargain about whether to let work to an independent contractor rather than carry it on himself. Its language does not require that he bargain about whether he shall carry on particular operations, but requires only that he bargain about the "wages, hours, and other terms and conditions" upon which men are to be employed in those operations upon which he decides.

We further submit that the order requiring that Petitioner resume its maintenance operations and reinstate with back pay the individuals who had been employed therein exceeds the Board's powers. It violates the express prohibition of compulsory reinstatement of employees terminated for cause and, furthermore, is punitive rather than remedial.

We submit that the Supplemental Decision and Order should be denied enforcement and should be vacated.

Respectfully submitted,

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(Appendix Follows)

Appendix

STATUTES INVOLVED

National Labor Relations Act

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to

rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

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"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

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"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

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"Sec. 10.

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"(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

Administrative Procedure Act

"Sec. 8.

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"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative

agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."